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No. 90-1624

IN THE SUPREME COURT
OF THE UNITED STATES

OCTOBER TERM, 1991

DANIEL-MARC AUGER, et. al., *Petitioners*

vs.

ANTOINETTE TENEYCK, et. al., *Respondents*

On Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit

REPLY OF PETITIONERS TO BRIEFS IN OPPOSITION FOR ALL RESPONDENTS

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I. REPLY TO RESPONDENTS, JANET BERSON AND ANTOINETTE TENEYCK, STEVEN TENEYCK, KENNETH S. DOMZALSKI AND BRIAN GUEST

A. REPLY TO THE PROCEDURAL ARGUMENT

Respondents correctly state that Petitioner filed his Notice of Appeal before the district court dismissed one of the parties from the case, Janet Berson. Respondents are correct that as of the date the Notice of Appeal was filed by Petitioner, the district court's judgment was not final as to all parties to the case. They are also correct that in the month following the filing of the Notice of Appeal, June, 1990, the district court rendered a final judgment dismissing Janet Berson from the case.

The weight of authority holds that orders adjudicating only some of the claims may be treated as final orders for the purpose of appellate jurisdiction if

the remaining claims have subsequently been finalized. Practical, not technical considerations, are to govern the application of principles of finality. See Anderson v. Allstate Insurance Company, 630 F.2d 677, 680-681 (9th Cir. 1980) citing the fifth and tenth circuits and citing Gillespie v. United States Steel Corporation, 379 U.S. 148 (1964) and Cohen v. Beneficial Industrial Loan Corporation, 337 U.S. 541 (1964). See Lovellette v. Southern Railway Company, 898 F.2d 1286, 1289 (7th Cir. 1990) citing 15C Wright & Miller, Federal Practice and Procedure, § 3913 n. 33 (1976 & Supp. 1989)

In this case, the district court rendered final judgment as to all Respondents except Janet Berson on April 6, 1990. On May 7, 1990, Petitioner filed a Notice of Appeal as to all

Respondents, including Janet Berson. The Third Circuit accepted and docketed this appeal. On June 26, 1990, the district court rendered final judgment as to Janet Berson.

Because claims against the last remaining defendant, Berson, were finalized shortly after the filing of the Notice of Appeal, the district court's judgment as to Berson and the other Respondents should be treated as final for the purposes of appellate jurisdiction.

But, assuming arguendo that the Third Circuit lacked jurisdiction to decide the Petitioner's appeal, as Respondents contend, then the Third Circuit's affirmance would be improper under Supreme Court Rule 10.1(a) and this Court should grant certiorari and reverse the Third Circuit on that ground.

Respondents' procedural argument is not material to the standards for granting certiorari. **"A litigant in a federal case is not compelled to wait until the case is over before seeking certiorari, because it is not a requirement of certiorari to review an order of a federal court that the order be a final decision."** Air Line Pilots Association International v. UAL Corporation, 897 F.2d 1394, 1397 (7th Cir. 1990). In other words, nothing in the language of Supreme Court Rule 10 governing review on writ of certiorari mandates that the judgment under review be a final judgment.

Respondents' procedural argument undercuts their position. Either the procedural argument is incorrect and does not advance their argument that certiorari should be denied, or,

alternatively, the argument, taken as true, **supports** the argument that the Third Circuit decision was improper and that this Court should grant certiorari for this reason.

B. REPLY TO SUBSTANTIVE ARGUMENTS

Respondents' substantive arguments against certiorari are also identical. They argue (1) that the Third Circuit correctly affirmed the holding of the district court that they were not state actors under 42 U.S.C. § 1983 and (2) that Petitioner did not produce evidence that they conspired with any state actor.

Respondents failed to address Petitioner's point that this Court has held that a private party conspiring with a state actor becomes imbued with state action as a result of the conspiracy. See Petitioner's Petition at 32-38. The Third Circuit disregarded this Court's

established precedent establishing this point. Petitioner's pro se complaint adequately alleges that these respondents conspired with state court judges. The complaint alleges that:

> The Defendants, and others unknown to the Plaintiffs at this time, at all times pertinent to this complaint have acted in concert under the color of the laws of New Jersey to deny Plaintiffs the equal protection of the law and due process of law, to interrupt, to curtail and terminate the parental rights of Plaintiff Raymond Auger, ...
>
> Petition for Writ of Certiorari at E-15.

The complaint also alleges in sufficient detail the role played by Janet Berson in the conspiracy in six paragraphs of the complaint: see paragraphs 40 to 45 of the complaint, pages E-38 to E-40 of the Petition for Writ of Certiorari. Similarly, the complaint also alleges in sufficient

detail the role played by the other Respondents: see pages 8 through 13 of the Petition for Writ of Certiorari.

Respondent Janet Berson states that Petitioner "produced no evidence to substantiate an inference that any court official influenced Dr. Berson." Berson's Brief in Opposition to Certiorari at 12. A plaintiff carries no burden to **produce evidence** in his complaint. He needs only conform to the notice pleading requirements of Federal Rule of Civil Procedure 8(b). A pro se litigant, of course, is held to less strict standards of pleading. See Petition for Certiorari at 26-27.

Neither the district nor circuit courts permitted Petitioner any opportunity to conduct discovery and gather evidence implicating Respondents. Petitioner was hardly in a position to

produce evidence. His pleadings were more than sufficient.

II. REPLY TO JUDICIAL RESPONDENTS:

THEY ARE INCORRECT AS TO PETITIONER'S CLAIM FOR INJUNCTIVE RELIEF AND ATTORNEY'S FEES AND COSTS BECAUSE THE THIRD CIRCUIT'S DECISION CONFLICTS WITH PULLIAM V. ALLEN[1]

A. WHAT PETITIONER'S COMPLAINT SAYS

Petitioner's pro se complaint pleads a § 1983 action against the judicial respondents for injunctive relief. No judicial immunity applies to his type of action. Pulliam v. Allen 466 U.S. 522 (1984). The Third Circuit disregarded settled Supreme Court precedent in affirming the dismissal of the judicial defendants as to claims for injunctive

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[1]Petitioners concede that no grounds for certiorari lie concerning the claims for damages under § 1983. However, these judges are required to testify even though they are immune. See Dennis v. Sparks 446 U.S. 24 (1980).

relief. Certiorari should be granted on this issue.

The pro se complaint requests:

> Preliminary and permanent injunctions against the Defendants and their agents, successors, employees, and associates, restraining the Defendants from further harassment, intimidation, and persecution of the Plaintiffs for denial of their constitutional rights, privileges and immunities
>
> Petition for Writ of Certiorari at E-58.

The complaint also requests:

> Judgment against the New Jersey Judges named above as municipal judge, Superior Court Judges, Appellate Court Judges, Supreme Court Judge, for injunctive relief and for filing costs
>
> Petition for Writ of Certiorari at E-56.

Petitioner, in addition, requested attorney's fees against the judicial respondents. Id. at E-60.

Furthermore, the complaint specifically describes the judicial conduct which Petitioner seeks to enjoin. For example, Petitioner alleges the following about trial level judges:

a. Judge Haines deprived him of custody and visitation without affording him due process. Petition for Writ of Certiorari at E-4, E-19, E-24, E-25, E-26, E-27, E-28, E-29, E-30, E-31, E-32, E-36, E-37, E-42.

b. Judge Tunney refused to review a custody order giving Petitioner's former wife sole custody, thus depriving him of constitutional rights. Petition at E-5 and E-46.

c. Judge Ferrelli ordered Petitioner to abdicate his parental rights in violation of

the constitution and retaliated by assessing him attorney's fees. Petition at E-6, E-40, E-43, E-44, E-45.

d. Judge Sullivan granted a restraining order against Petitioner ex parte, thus depriving him of procedural due process. Petition at E-21.

Taking these pro se allegations as a true for the purposes of Rule 12(b)(6), and reading them with the leniency required by this Court in Haines v. Kerner 404 U.S. 519 (1972), they clearly plead a proper cause of action for injunctive relief under Pulliam v. Allen, supra. They establish that these judges systematically deprived petitioner of custody and visitation without affording him procedural due process the law

requires when fundamental constitutional rights are involved.

B. THE COMPLAINT PLEADS DEPRIVATIONS OF CONSTITUTIONAL RIGHTS BY JUDGES

The right to parent-child relationship is a fundamental right under the Constitution protected by due process clause of the Fourteenth Amendment and the Equal Protection Clause. See Santosky v. Kramer, 455 U.S. 745, 753 (1982), Stanley v. Illinois, 405 U.S. 645, 651 (1972) and cases cited in the Petition for Writ of Certiorari at 31-32. See Michael H. v. Gerald D. ___ U.S. ___, 109 S.Ct. 2333, 2347 (1989)(plurality holding that father has constitutionally protected interest in his relationship with his child); Lassiter v. Department of Social Services, 452 U.S. 18, 27 (1981); Lehr v. Robertson, 463 U.S. 248, 256 (1983).

When a state court deprives a parent of custody and/or visitation, the deprivation is one of constitutional dimension. That constitutes irreparable harm. A federal district court has jurisdiction to enjoin future deprivations by state court judges if these deprivations violated due process.

C. WHAT PULLIAM V. ALLEN HELD

In Pulliam v. Allen, 466 U.S. 522 (1984) this Court held that judicial immunity is not a bar to prospective injunctive relief against a judicial officer acting in her judicial capacity and that judges may be liable for attorney's fees and costs under 42 U.S.C. § 1988. Pulliam has twice been cited with approval by this Court since 1984. See Kentucky v. Graham, 473 U.S. 159, 164 (1985) and Forrester v. White, _____

U.S. _____, 108 S.Ct. 538, 545 (1988).

Pulliam v. Allen is the law of this land.

In Pulliam v. Allen, supra., plaintiff sought an injunction against a state court magistrate in federal district court under 42 U.S.C. § 1983. Plaintiff claimed that her practice of imposing bail upon persons arrested for nonjailable offenses and incarcerating people unable to post bail was unconstitutional. This Court affirmed the Court of Appeals which had affirmed the district court's granting of the injunction and assessing attorney's fees and costs against the judge.

This Court said in Pulliam v. Allen:

> We have never had a rule of absolute judicial immunity from prospective relief and there is no evidence that absence of immunity has had a chilling effect on judicial independence.
>
> 466 U.S. at 536.

This Court also stated:

> Congress enacted § 1983 and its predecessor, § 2 of the Civil Rights Act of 1866 to provide an independent avenue for protection of federal constitutional rights. The remedy was considered necessary because **state courts were being used to harass and injure individuals, either because state courts were powerless to stop deprivations, or were in league with those bent on abrogating federally protected rights.**
>
> 466 U.S. at 540.

Petitioner's pro se complaint alleges that state court judges harassed and injured him and other fathers by depriving him and other fathers of the federally protected right of maintaining and nurturing the parent child relationship. Petitioner alleges that judges failed to afford him and other fathers elementary rights of due process and equal protection which resulted in his losing custody and visitation and

losing his parental right to participate in child rearing decisions affecting his own children. Petitioner's claim is almost identical to that of the plaintiff in Pulliam v. Allen.

D. THE THIRD CIRCUIT DISREGARDED PULLIAM V. ALLEN

The Third Circuit affirmed the district court's dismissal of Petitioner's claim for prospective injunctive relief against the judicial respondents. The district court rejected this claim in one short paragraph without analyzing the issue:

> United States District Courts have no jurisdiction "over challenges to State Court decisions in particular cases if those challenges allege that the state court's action was unconstitutional. Review of those decisions may be had only in [the Supreme Court]. 28 U.S.C. § 1257. District of Columbia Court of Appeals v. Feldman 460 U.S. 462, 482 (1983). Mr. Auger's sole recourse is to the United

States Supreme Court to redress any alleged constitutional error in the decisions of the New Jersey courts.

Petition for Writ of Certiorari at B-10.

The district court's holding (and the Third Circuit's affirmance) conflicts with this Court's holding in Pulliam v. Allen, supra. This conflict between the Third Circuit and this Court provides the basis for certiorari review. Pulliam v. Allen permitted federal court jurisdiction over a claim against a state judge who deprived litigants of federal due process rights in a particular case. Pulliam v. Allen did not hold that plaintiff's only recourse was to appeal the federal constitutional issues to the state supreme court and then to this Court.

District of Columbia Court of Appeals v. Feldman 460 U.S. 462 (1983),

relied upon by the district court, is distinguishable. The issue presented was whether the District of Columbia federal district court had jurisdiction to review a decision of the District of Columbia federal circuit court which denied plaintiff's application to be admitted to the District of Columbia bar.

The case turned on whether the circuit court's decision was a judicial act not subject to district court review, or whether its decision was a non-judicial, or ministerial act, which would be subject to district court review. Feldman held that the district court had jurisdiction to review plaintiff's challenge to the constitutionality of a bar admission rule which excluded lawyers who had not graduated from an approved law school, but that the district court lacked jurisdiction to review the circuit

court's application of that rule to the particular plaintiff.

The district court (and Third Circuit) in the case at bar relied on **pure dictum** in Feldman stating that the district court had no authority to review final **state** court judgments pertaining to bar admissions, that review can only be had in this Court. 460 U.S. at 482. This comment, pertaining to state court judgments, had no relevance to the issue presented, e.g., whether a **federal** district court had jurisdiction to review a bar admission decision rendered by a **federal** appeals court.[2]

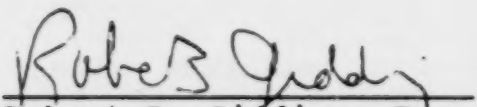
---

[2] The Feldman case does not support dismissal of the judicial respondents for other reasons. First, it was decided **before** Pulliam v. Allen; it cannot be argued that Feldman restricted or narrowed Pulliam. Second, this Court in Pulliam did not even cite to Feldman. If the Court regarded Feldman as relevant to Pulliam, it surely would have recognized that in its opinion in Pulliam.

Feldman should not be relevant to the case at bar. But if, as the district court stated in its opinion, it does control here, and the district court lacks jurisdiction over Petitioner's claim for injunctive relief under § 1983, then we are faced with two conflicting United States Supreme Court decisions: Feldman and Pulliam. If this is so, this Court should grant review to resolve this conflict.

If Feldman is not relevant, then the Third Circuit's decision affirming the district court directly conflicts with this Court's holding in Pulliam v. Allen. This Court should grant the petition for review on this ground.

Respectfully submitted,



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